

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

FELIPE GARCIA)	
Claimant)	
VS.)	
)	
EXCEL CORPORATION)	Docket Nos. 181,106,
Respondent)	183,478 & 186,639
Self-Insured)	
VS.)	
)	
WORKERS COMPENSATION FUND)	

ORDER

Claimant requested review of the January 9, 1996, Order of Administrative Law Judge Shannon S. Krysl. The Appeals Board heard oral argument on May 14, 1996.

ISSUES

Claimant and respondent entered into a settlement of these three docketed claims which was approved by Special Administrative Law Judge LeRoy Rose on September 21, 1995. That settlement called for a lump sum payment of \$40,000 on a strict compromise of all issues between claimant and respondent less the \$18,836.34 in permanent partial disability benefits previously paid pursuant to an agreement reached at the pretrial settlement conference hearing. The issues for Appeals Board review concern the apportionment of attorney fees as between claimant's present and former attorneys and the treatment of expenses with regard to the calculation of attorney fees. The question of whether the 1993 amendments to K.S.A. 44-536 apply to this claim was not raised by the parties, and since this question is not determinative of the issues at bar, it will not be addressed. For purposes of this review, the Appeals Board will refer to the present version of the statute.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This appeal arises out of an attorney fee dispute between claimant's former attorneys, Wilson, Lee & Gurney, and the claimant's present attorneys, Shultz & Associates, P.A. Claimant retained the law firm of Wilson, Lee & Gurney on approximately July 15, 1993. That firm continued to represent claimant until May 12, 1995, when they were terminated by claimant. The contract between claimant and Wilson, Lee & Gurney called for a contingency fee of 20 percent. A pretrial settlement conference was held on January 5, 1995, at which time the parties, through their respective counsel, stipulated to a 14.5 percent impairment of function. The Administrative Law Judge found the firm of Wilson, Lee & Gurney entitled to attorney fees equal to 20 percent of the value of the functional impairment, after expenses. Claimant's present attorneys, Shultz & Associates, object to the Administrative Law Judge's having based her calculation of attorneys fees upon the contingency fee contract. Present counsel argues that the fee for an attorney before the conclusion of the case should be based instead upon the reasonable value of said attorney's services *in quantum meruit*.

First, the present counsel for claimant argues the letter of November 1, 1995, to the Special Administrative Law Judge and the breakdown of attorney time spent by Wilson, Lee & Gurney attached thereto should not be considered as evidence in this case. However, the Special Administrative Law Judge specifically left the record open for the receipt of this information and Wilson, Lee & Gurney provided same in response to the Court's request. There was no objection at the time by claimant's present counsel nor was there any timely request to cross-examine prior counsel on such evidence. Accordingly, the evidence provided with the letter of November 1, 1995, should be considered as part of the record in this case.

The Appeals Board finds the award of \$3,767.27 to Wilson, Lee & Gurney to be a reasonable and appropriate amount under the facts and circumstances of this case. Said firm represented claimant beyond the January 5, 1995, pretrial settlement conference and provided valuable services to claimant which resulted, in part, in claimant's ultimate ability to conclude his claims for an amount in excess of the percentage of functional impairment. In addition, it appears that the agreement to a functional impairment rating at the January 5, 1995, pretrial settlement conference was likewise an agreement to the compensability of the claim as claimant was thereafter paid permanent partial disability benefits based upon that percentage of permanent impairment prior to the ultimate conclusion of the three docketed claims by the September 21, 1995, settlement. Hence, at least to this extent, the contingency called for in the attorney fee contract was met.

See Madison v. Goodyear Tire & Rubber Co., 8 Kan. App. 2d 575, 663 P.2d. (1983).

The Administrative Law Judge noted the apparent conflict between the attorney fees provisions of K.S.A. 44-536 and Rule 1.5(d) of the Model Rules of Professional Conduct

with regard to the treatment of expenses. The Workers Compensation Act specifically provides in K.S.A. 44-536(a) that the attorney's claim for services shall be based upon a percentage of the total compensation recovered "in addition to actual expenses incurred". However, the Model Rule of Professional Conduct 1.5(d) adopted in Supreme Court Rule 226, makes general provisions for the regulation of contingency fee contracts and calls for the deduction of expenses prior to the application of the contingency fee percentage to the amount recovered. The Appeals Board finds the specific language of the statute in the Workers Compensation Act takes precedence over the general language of the Supreme Court Rule.

The question of whether specific language in a workers compensation statute can be superseded by application of a Supreme Court Rule was presented to the Court in Jones v. Continental Can Co., 260 Kan. 547, 920 P.2d 939 (1996). At page 556, the Kansas Supreme Court stated "It is our longstanding rule that a specific statute, such as one applying to appeals of workers compensation cases, prevails over a general statute unless it appears the legislature intended to make the general statute controlling." Citing State v. Williams, 250 Kan. 730, Syl. ¶1, 829 P.2d 892 (1992). However, the Supreme Court is specifically afforded the power to promulgate rules necessary to implement the court's constitutional and statutory authority. See Kan. Const. Art. 3, §§ 1,3; K.S.A. 20-321. The Kansas Supreme Court has the power to regulate and control the practice of law in this state. The legislature may not contravene the separation of powers doctrine by usurping the Court's function in this regard. Nevertheless, it appears that both the Court's Rule and the statute are intended to achieve the same goal; that being to require attorneys to charge reasonable fees. Accordingly, the legislation does not have any deleterious impact on the Court's function and does not constitute an usurpation of the Court's power to regulate and control the practice of law.

The Model Rule of Professional Conduct 1.5(d) calls for a deduction of expenses before calculating a contingency fee, however the Rule does not provide for a specific percentage as being reasonable. On the other hand, K.S.A. 44-536(a) limits attorney fees to specific percentages of certain specific amounts of the recovery. It further restricts attorney fees to percentages of compensation, excluding from the computation the amount of recovery for medical expenses and vocational rehabilitation benefits. It also excludes attorney fees for disability compensation payments not obtained by the efforts of the attorney and for any amount of compensation offered in writing prior to representation. The Workers Compensation Act is thus much more restrictive and limiting of an attorney's ability to charge a fee than is the Supreme Court Rule. Therefore, the Appeals Board finds the workers compensation statute to be consistent with the Court's effort in its Rules to regulate the attorney-client relationship in a way which serves to make contingent fee agreements reasonable and enable injured workers to obtain competent legal representation. Thus, K.S.A. 44-536(a) does not contravene the separation of powers doctrine. The general rule of statutory construction whereby the specific statute takes precedence over the general should be applied. The Administrative Law Judge's Order

is therefore reversed to the extent it requires expenses to be deducted before the attorney fee is calculated.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge Shannon S. Kysle dated January 9, 1996, should be, and hereby is, affirmed to the extent that it awards the firm of Wilson, Lee & Gurney 20 percent of the value of the functional impairment award, but is reversed to the extent that it requires expenses to be deducted before the attorney fees are calculated.

IT IS SO ORDERED.

Dated this ____ day of January 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: John D. Shultz, Dodge City, KS
David J. Rebein, Dodge City, KS
Lawrence M. Gurney, Wichita, KS
Office of Administrative Law Judge, Garden City, KS
Philip S. Harness, Director